

USE OF A LENDER'S NAME IN ADVERTISING NOW RESTRICTED



In the Fall 2004 issue of the *Mortgage Loan Bulletin* we informed you about new legislation of interest to the mortgage industry. This article will provide a more in-depth discussion of one of the new laws that took effect on January 1, 2005.

Senate Bill 1150 (Burton) added Chapter 4, Solicitations for Financial Services (Sections 14700 through 14704), to the California Business and Professions Code. The new law prohibits the inclusion of a lender's name in a written solicitation for financial services directed to a consumer without the **lender's** consent unless certain specified conditions are met. The law also prohibits the inclusion of a consumer's loan number or loan amount in a written solicitation for services or products without the **consumer's** consent unless certain specified conditions are met.

Specifically, under the new law, for any person to include the name, trade name, logo or tagline of a lender, without the lender's consent, in a written solicitation for a loan to a consumer who has obtained a loan from the lender, the solicitation must **clearly and conspicuously** state that the person is **not** sponsored by or affiliated with the lender and that the solicitation is **not** authorized by the lender who must be identified by name. This disclaimer statement must be made in

close proximity to and in the same or larger font size as the first and most prominent use of the name, trade name, logo or tagline in the solicitation, including on the envelope or through the window of the envelope.

No person can use the name of a lender or a name similar to a lender in a solicitation for a loan if it would cause a reasonable person to be confused or believe that the solicitor has any connection to or approval or endorsement from the lender.

Additionally, no person can include a consumer's loan number or loan amount, whether or not publicly available, in a solicitation for a loan without the **consumer's** consent unless the solicitation clearly and conspicuously states, when applicable, that the person is **not** sponsored by or affiliated with the lender, and that the solicitation is not authorized by the lender and that the consumer's loan information was **not** provided to that person by the lender. This disclaimer statement must be made in close proximity to and in the same or larger font size as the first and most prominent use of the consumer's loan information in the solicitation including on an envelope or through an envelope window.

The law provides that it is **not** a violation for any person to use a lender's

name or trade name without the required disclaimer in a comparison of like products or services when the solicitor clearly and conspicuously identifies itself.

Any person who violates the statute is subject to an injunction and the payment to a plaintiff of any actual damages. The objective of this statute is to stop advertisements that are designed to trick or confuse consumers into believing that the mailers are sent by a lender from whom the consumer has obtained a loan.

Brokers are encouraged to review the new Chapter 4 of the Business and Professions Code (available on the DRE Web site www.dre.ca.gov under 2005 Real Estate Law, Excerpts from the Real Estate Law) as well as the Department's advertising criteria in Section 2848 of the Commissioner's Regulations (available on the DRE Web site under Regulations).

Also, brokers can submit their advertising on a voluntary basis for DRE review and approval for \$40.00 per ad using the Mortgage Loan Advertising Submission (RE 884) form available on the DRE Web site under Forms.

Questions regarding this or other advertising questions can be directed to the Mortgage Loan Activities Unit at (916) 227-0770.

MORTGAGE LOAN BULLETIN

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STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER
Governor

BUSINESS, TRANSPORTATION AND
HOUSING AGENCY
SUNNE WRIGHT MCPEAK
Secretary

DEPARTMENT OF REAL ESTATE
JEFF DAVI
Real Estate Commissioner

Principal Office
2201 Broadway
Sacramento, CA 95818

Mailing Address
P.O. Box 187000, Sacramento, CA
95818-7000

Telephone
(916) 227-0770

John R. Liberator
Chief Deputy Commissioner

Larry Alamao
Chief Counsel

Gary Sibner
Managing Deputy Commissioner III
Mortgage Lending

Sylvia Yrigollen
Senior Deputy Commissioner
Mortgage Lending Advertising

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DRE's Internet address is:
<http://www.dre.ca.gov>



LENDER NOTIFICATION

In the Fall 2004 *Mortgage Loan Bulletin* we advised that, effective January 1, 2005, DRE-licensed **lenders** who meet certain criteria must file a notice with the Department on an annual basis no later than March 31.



The criteria are as follows:

Lender Notification

10131.8. (a) A real estate broker who acts pursuant to subdivision (d) of Section 10131 and who meets all of the following requirements shall notify the department annually in writing on a form that is acceptable to the commissioner:

(1) The real estate broker is an approved lender for the Federal Housing Administration, Veterans Administration, Farmers Home Administration, Government National Mortgage Association, Federal National Mortgage Administration, or the Federal Home Loan Mortgage Corporation.

(2) The real estate broker makes residential mortgage loans to a loan applicant for a residential mortgage loan by using or advancing the broker's own funds, or by making a commitment to advance the broker's own funds.

(3) The real estate broker makes the credit decision in the loan transaction.

(4) The real estate broker at all times maintains a tangible net worth, computed in accordance with generally accepted accounting standards, of a minimum of two hundred fifty thousand dollars (\$250,000).

(b) As used in paragraph (2) of subdivision (a), "own funds" means (1) cash, corporate capital, or credit lines at commercial banks, savings banks, savings and loan associations, industrial loan companies, or other sources that are liability items on the real estate broker's financial statements, whether secured or unsecured, or (2) cash, corporate capital, or warehouse credit lines at commercial banks, savings banks, savings and loan associations, industrial loan companies, or other sources that are liability items on the financial statements of an affiliate of the real estate broker, whether secured or unsecured. "Own funds" does not warehouse include funds provided by a third party to fund a loan on condition that the third party will subsequently purchase or accept an assignment of the loan.

If you are a lender that meets **all** of the above criteria and have not submitted the notice you should do so immediately. The Residential Mortgage Lender Notification (RE 859) form is available on the DRE Web site www.dre.ca.gov under Forms.

Please note that this notice is separate from the annual RML report discussed on page 4. Questions regarding this or any other mortgage loan compliance issue should be directed to the Mortgage Loan Activities Unit at (916) 227-0770. 📞

PROTECT YOUR LICENSE

Only Employ Licensed Salespersons

A real estate broker owned a real estate and mortgage company. She negotiated the purchase of a home on behalf of the buyers and referred them to her employee to represent them in the loan transaction. When the buyers complained to the Department of Real Estate about substantial misrepresentations of the terms and costs of the loan, the failure to provide them with disclosure statements, and other problems in the transaction, an investigation discovered that the loan officer was not licensed. The Department filed an Accusation against the broker and, after an administrative hearing, the broker's license was revoked outright. The broker in this actual case had been licensed for almost 20 years.

**the employee was not licensed...
the broker's license was revoked**

This case typifies the risks that a broker takes when he or she either intentionally or negligently employs unlicensed salespeople. Not only is the broker at risk, but the public is as well. Business and Professions (B&P) Code Section 10130 states, "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department. The commissioner may refer a complaint for violation of this section before any court of jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial." B&P Code Section 10137 provides that the Department can, after an administrative hearing, temporarily suspend or permanently revoke a real estate license for employing or compensating an unlicensed person.

How does a broker ensure that only licensed salespeople are employed?

The broker is obligated to retain the real estate salesperson's original license certificate (B&P Code Section 10160 and Commissioner's Regulation [Regulation] 2753) and notify the Department of the employment (Section 10161.8[a] of the Code and Regulation 2752). Prior to hiring any salesperson it is highly recommended that the broker use the "Check License Status" button on the DRE Web site www.dre.ca.gov to verify the validity of the license and confirm the person's name, license identification number and expiration date. Since there have been some incidents where license certificates have been altered, brokers would be prudent to use the

DRE Web site to double check on the licenses of employees.

In addition, brokers should have a system in place to track the status of employees' licenses. The broker who hires a licensee who performs licensed activity after license expiration is guilty of the same violation as the broker who hires an unlicensed person. To avoid the risk of disciplinary action, brokers should have a system in place to track employees' license expiration dates. Also, when employ-

ing a newly licensed salesperson who holds an 18 month conditional license, the broker must ensure that the salesperson completes the required statutory/pre-license education courses (B&P Code Section 10153.4). The Department notifies brokers when conditional salesperson licenses are suspended due to failure to complete the required courses. Again, however, the broker is at risk for employing or compensating a person with a suspended license, if the salesperson continues to perform licensed activities.

Protect your broker license and your clients by only employing properly licensed salespersons. In addition to the damage that can be inflicted on the public by unlicensed and negligent salespersons, the substantial investment you have made in your business could be lost like the broker illustrated in this article.

More information on the subject of salesperson licensing is provided in the Spring 2005 issue of the Real Estate Bulletin, available on the DRE Web site under Publications.

Questions regarding this and other mortgage loan-related issues can be answered by calling (916) 227-0770.



Make sure your employees are properly licensed:

- ✓ retain your employees' original license certificates
- ✓ use the "Check License Status" button on the DRE Web site www.dre.ca.gov to verify your employees' information
- ✓ track your employees' license expiration dates and make sure they renew their licenses
- ✓ make sure salespersons issued conditional licenses complete their statutory/pre-license education courses within 18 months as required

RESIDENTIAL MORTGAGE LOAN REPORT REMINDER

Reminder! Pursuant to Health and Safety Code §35815 and §35816, real estate brokers who are direct lenders in certain types of loan transactions are required to report to the Department of Real Estate (DRE) activities related to the number of applications received from, and number and dollar amount of loans made to, the public for home purchase and/or home improvement purposes. **If a real estate broker reports such lending activity to the U.S. Department of Housing and Urban Development (HUD) under the provisions of the federal Home Mortgage Disclosure Act (HMDA), it is not necessary for the real estate broker to report to the DRE.**

Please review the following criteria from the HMDA Web site www.ffiec.gov/hmda to determine if you meet the federal reporting criteria:

2004 REPORTING CRITERIA FOR NONDEPOSITORY INSTITUTIONS

Use information and data from the preceding December 31 date when determining whether you meet the reporting criteria. The following questions for a nondepository institution should be answered to determine if you should report CY 2004 HMDA data in 2005.

1. Is the nondepository institution a for-profit lender?
2. In the preceding calendar year, did the institution's home purchase loan originations (including refinancings of home purchase loans) equal or exceed 10 percent of its total loan originations, measured in dollars, or equal \$25 million or more?
3. Did the nondepository institution either: (a) have a home or branch office in an MSA/MD on the preceding December 31, or (b) receive applications for, originate, or purchase 5 or more home purchase or home improvement loans on property located in an MSA/MD in the preceding calendar year?

The new 5-digit MSAs/MDs are used to determine whether your institution was in an MSA or MD on December 31, 2003. Also use the new MSA/MDs when geocoding the property location on your 2004 HMDA loan application records.

See www.ffiec.gov/hmda/report2004msa.htm to determine if MSA/MD realignments have affected your reporting status.

Refer to Geocoding Information at www.ffiec.gov/hmda/geocode.htm for additional important information about the new Metropolitan Statistical Areas/Metropolitan Divisions (MSAs/MDs).

4. Did the nondepository institution either: (a) have assets (when combined with the assets of any parent corporation) exceeding \$10 million on the preceding December 31, or (b) originate 100 or more home purchase loans (including refinancings of home purchase loans) in the preceding calendar year?

If a nondepository institution responds 'YES' to question 1 above and 'YES' to at least one question in 2, and one question in 3, and one question in 4, then HMDA applies to the institution's loan originations, purchases, and applications in the current calendar year. A negative response to question 1, or to all the questions in 2, 3, or 4 exempts the institution from filing HMDA data for the current calendar year.

For nondepository institutions, a branch office is any office of the institution that takes applications from the public for home purchase or home improvement loans. It does not include offices of affiliates or other third parties such as loan brokers.

If you are a lender and do not meet the above HMDA reporting criteria please review the following:

The State of California Residential Mortgage Loan Report (RE 857) must be submitted to the DRE by all real estate brokers whose assets total \$10 million or less and who regularly *make* real estate purchase and/or home improvement loans. "Regularly" is defined to mean twelve or more transactions annually during the immediately preceding calendar year that, in aggregate, total more than \$500,000. ***Licensees who only broker, and do not make, loans are not required to report.***

Mortgage lending data is to be collected annually and reported on the RE 857 by March 31 of the following year. The RE 857 and instructions are available on the DRE Web site www.dre.ca.gov under Forms. If you are required to file the Residential Mortgage Loan Report for calendar year 2004 and have not yet done so, please contact the Sacramento Mortgage Loan Activities Unit at (916) 227-0770. 📞